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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1337 102

RAYMOND J. GRACE, Trading under the name and style of R. J. & M. C. Grace, *Petitioner*,

v.

M. HAMPTON MAGRUDER, Collector of Internal Revenue, *Respondent*.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

LOWRY N. COE,
Attorney for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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M. HAMPTON MAGRUDER, Collector of Internal Revenue, *Respondent*.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

The petitioner, Raymond J. Grace, trading under the name of R. J. & M. C. Grace, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia in the above entitled cause on March 19, 1945. (R. 68)

SUMMARY AND STATEMENT OF THE MATTER INVOLVED.

Petitioner sued Magruder, Collector of Internal Revenue, to recover certain taxes assessed against and paid by him under the Social Security Act.

The tax in dispute under Title VIII of said Act amounted to $194.56, representing the supposed employers' and employees' shares and interest, covering the period from September 1, 1937 to September 30, 1941. The tax under Title IX totaled $397.34, including 25 per cent penalty and interest, covering the calendar years 1936 to 1940 inclusive.

The major portion of these assessments was levied by the Commissioner of Internal Revenue upon his theory that certain men (commonly called coal hustlers) who carried coal sold by the petitioner, from the street where it was dumped, to the customer's bin, for fixed charges of 75 cents per ton of coal stored, were employees of the petitioner, and that storage charges collected by petitioner from the consumer and transmitted to the hustler were payments of wages under the Act.

The assessments also applied to moneys paid to a watchman at a railroad yard and payments for extra labor. The legality of the assessments respecting these two types of workers is considered unimportant to petitioner and this petition is filed primarily respecting the assessments made on account of the coal hustlers.

The principal issue therefore is whether or not coal hustlers are employees of the petitioner within the meaning of the Social Security Act and whether or not the small payments for storage by the ton constituted payments of wages under the Act.

Petitioner contends that the hustlers are not employees and that storage charges collected by petitioner from the consumer and transmitted to the hustlers do not constitute payments of wages under said Act; and that it was not the intention of Congress to have these men embraced within the provisions of the Act; that therefore the taxes assessed

and paid were improperly and illegally assessed and collected, and petitioner is entitled to recover the same.

The case went to trial before the District Court of the United States for the District of Columbia upon a stipulation of facts and evidence. Most of the fact are included in the Court's findings of fact (R. 56). The details of the relationship existing between the petitioner and the coal hustlers are set forth in paragraph 8 of the findings of fact (R. 58).

The Trial Justice concluded under a liberal construction of the Act (R. 45) that the persons described were employees of the petitioner and engaged in his employment within the meaning of the applicable provisions of the said Act, and that payments made by petitioner to said persons were payments of wages within the meaning of said Act. (R. 62).

The United States Court of Appeals for the District of Columbia affirmed said opinion on March 19, 1945.

Chapter 9 of the Act (Employee's tax) imposes

> "upon the income of every individual a tax equal to the following percentages of wages * * * with respect to employment * * *:
>
> (1) With respect to wages received during the calendar years * * *."

and further provides that the tax

> "shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid." (App. 15)

And in addition to the employee's tax, the Act provides:

> "Every employer shall pay an excise tax with respect to having individuals in his employ, equal to the following percentages of the wages * * * paid by him * * * with respect to employment * * *. (App. 15)

The Act further provides:

> "The term 'wages' means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; * * *"

and provides (Section 1426 b):

> "The term 'employment' means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, by an employee for the person employing him. * * * (App. 16)

The Act provides also, (Section 1429):

> "The Commissioner with the approval of the Secretary, shall make and publish rules and regulations for the enforcement of this subchapter."

Pursuant thereto the Commissioner by his Regulations defined employees as covered by said Act (App. 18-20), the Regulations providing generally that if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor, not an employee, and an individual performing services as an independent contractor is not as to such services an employee. (App. 20)

It is contended by the petitioner that no relationship of employer and employee exists between him and the coal hustlers, and that the storage charges paid the hustlers and collected from the consumers do not constitute the payment of wages within the meaning of the Act; that the Regulations adopted by the Commissioner, with the approval of the Secretary, have the force and effect of law; that the relationship between the petitioner and the hustlers does not bring them within the Act nor does it constitute the relationship of employer and employee under the law.

It is likewise contended that Congress did not intend that men of the type involved here be covered by the Act. The Act specifically excludes from its operation a large number of classes of labor in actual employment, including domestic labor in private homes (which would include persons within a similar social class), agricultural labor, casual labor not

in the course of the employer's trade or business, services performed by members of crews of vessels, services performed by persons in the employ of son or daughter, or performed by person in employ of a spouse or by a minor in employ of a parent, services performed for non-profitable institutions of a religious, charitable, literary or educational purpose or for prevention of cruelty to children or animals (Act Section 1426 b-h). The Circuit Court of Appeals in the case of *Glenn* v. *Beard*, 141 Fed. (2) 376, stated:

> "However, almost half of all the persons gainfully occupied in the United States are excluded by Congress from the benefits of the statute. Senate Report No. 628, 74th Congress, 1st Session, page 9."

The exclusion by Congress of a large percentage of persons actually in the legal status of employees, shows that Congress intentionally excluded certain types of labor, so that it may well be presumed that Congress in making the Act apply to employers with respect to have individuals in his employ and basing the tax levied upon wages paid, did not intend to include the type of jobbers involved here.

Three decisions of the Circuit Court of Appeals dealing with the relationship of employer and employee under the Social Security Act have been rendered, two by the 4th Circuit Court of Appeals and one by the 6th Circuit Court of Appeals.

The most recent decision of the 4th Circuit is directly in conflict with the decision of the 6th Circuit on the issue of what constitutes the relationship of employer and employee under the Social Security Act.

The case of *Magruder, Collector*, v. *Yellow Cab Company of D. C., Inc.*, in the 4th Circuit, 141 Fed. (2) 324, involved the question as to whether or not taxicab drivers who operated cabs of the Yellow Cab Company in the District of Columbia under a lease agreement were employees. The elaborate and well written opinion of Judge Chestnut of the District Court in Baltimore (49 Fed. Supp. 605) was af-

firmed. The Circuit Court of Appeals in affirming said opinion discussed the question further, in view of the importance of the question. Both the opinion of Judge Chestnut and the Circuit Court of Appeals upheld the view of the law taken by the petitioner in this case. Petitioner does not contend that there is any similarity between the relationship existing between the laborers in this case and the taxicab company and its drivers, but relied on the *Yellow Cab* case because the very elaborate statements of law contained within the opinions in that case amply supported the position of the petitioner in this.

The same Circuit Court of Appeals in a later decision, *United States* v. *Vogue, Inc.*, 145 Fed. 2d 609, decided that seamstresses employed in a department store and paid compensation by the job less a commission to the store, were employees within the meaning of the Act. The Court went into an elaborate discussion of what constitutes the relationship of employer and employee under the Social Security Act, and while the facts in that case are considerably different than those in this case and the Court held that these workers in the department store were clearly employees, its opinion as to the reason for so holding is entirely in conflict with the opinion in the *Beard case* hereinafter referred to, in the 6th Circuit.

The Court of Appeals for the District of Columbia in the case upon which this petition is based appears to have followed the decision in the *Vogue* case rather than the *Yellow Cab* case and the *Beard* case hereinafter mentioned. The facts in the *Vogue* case are so entirely distinguishable from the case involved here that it is submitted that that case is not authority for the decision of the United States Court of Appeals in this case.

The case of *Glenn, Collector*, v. *Beard* in the 6th Circuit, 141 F. 2d 376, decided the question as to what constitutes the relationship of employer and employee in a case involving needleworkers making quilts and comforters at their homes on a job price basis. The decision in that case being entirely

in conflict with the Court's opinion in the *Vogue* case, supports the position taken by the petitioner in the case involved here and appears to be the more sound decision.

REASONS RELIED ON FOR ALLOWANCE OF CERTIORARI.

The case involves a question of general importance and a question of substance relating to the construction of the Social Security Act, which has not but should be settled by this Court, and on which there is a conflict between decisions of the 6th Circuit Court of Appeals and the 4th Circuit Court of Appeals.

RAYMOND J. GRACE, trading under the name and style of R. J. & M. C. Grace.

By LOWRY N. COE,
Attorney for Petitioner.

IN THE

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v.

M. HAMPTON MAGRUDER, Collector of Internal Revenue, *Respondent*.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINION OF COURT BELOW.

The opinion of the United States Court of Appeals for the District of Columbia is in the record at pages 68-71.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925, Title 28 U. S. C., Section 347.

Final judgment was entered in the United States Court of Appeals for the District of Columbia on March 19, 1945.

STATUTES AND REGULATIONS INVOLVED.

Chapter 9, Subchapter A, Internal Revenue Code; 53 Stat. 175, as amended August 10, 1939, c. 666, Title VI Sec. 601; 53 Stat. 1381; 26 USCA Sec. 1400-1401-1410-1426-1429;

Chapter 9, Subchapter C, Internal Revenue Code, 53 Stat. 183 as amended August 10, 1939, c. 666, Title VI Sec. 608, 53 Stat. 1387; 26 USCA Sec. 1600, 1607, 1609;

Regulations 90 Bureau of Internal Revenue relating to excise tax on employer under Title IX of the Social Security Act, Article 205; C. F. R. Title 26, Sec. 403 et seq.;

Regulations 91 of the Bureau of Internal Revenue relating to employees tax and employers tax under Title VIII of the Social Security Act, Articles 2, 3, and 4; C. F. R. Title 26, Sec. 402 et seq.

(Applicable portions set out in Appendix.)

QUESTIONS PRESENTED.

The question presented is whether or not coal hustlers who store coal for the consumer at the point of delivery and who are paid 75¢ per ton for carrying in and storing the coal are employees of the petitioner coal dealer within the purview of the Social Security Act and whether or not the storage charges collected from the customer by the dealer and paid to the hustler constitutes the payment of wages within the meaning of said Act.

STATEMENT OF CASE.

The facts are sufficiently stated in the petition for certiorari.

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE USED.

The petitioner contends that the Court below erred in holding that coal hustlers were employees of the petitioner within the purview of the Social Security Act and that storage charges collected by the petitioner from the consumer and transmitted to the hustler constituted the payment of wages within the provisions of said Act.

SUMMARY OF ARGUMENT.

The Court below followed the case of *United States* v. *Vogue, Inc.*, 145 Fed. (2) 609, decided by the Circuit Court of Appeals, 4th Circuit, on November 14, 1944. The facts in that case were wholly unlike the facts in this case. The workers held by the Court to be employees were employed in a department store to make alterations upon garments sold by the employer at certain charges for alterations, which were collected by the employer and a percentage thereof paid to the workers weekly whether collected by the employer or not. For a time the workers were on a salary basis. They did their work within the establishment of the employer and were obviously subject to the control of the employer in performance of their work. The Court in that case held:

> "We think it perfectly clear that Mrs. Fulton and Mrs. Woodfin were not independent contractors, but *employees within any fair meaning of that term* and certainly within the meaning of the Social Security Act." (Italics supplied.)

The Court also cited the Regulations of the Commissioner of Internal Revenue and brought the employees within their terms.

The case of *Glenn* v. *Beard*, 141 Fed. (2) 376, decided by the Circuit Court of Appeals, 6th Circuit, on March 20, 1944, is directly in conflict with the opinion in the *Vogue* case, and supports petitioner's case. The class of workers in that case were women doing needlework in their homes on a job basis, the Court holding these workers not to be employees within the meaning of the Social Security Act. The facts in the *Beard* case are not identical with the facts in the present case, nevertheless it is submitted that that case gives the correct expression of the law.

The question presented is of importance and the conflict should be settled by this Court.

The Commissioner of Internal Revenue pursuant to authority of the Act adopted certain Regulations for the interpretation and administration of the act (App. 18-20). A

reading of the facts relating to the relationship between the petitioner and coal hustlers (R. 58-60) clearly demonstrates that these men do not fall within the language of the statute or the Regulations. The Regulations have the force and effect of law. They are construed in the light of the facts in both of the cases referred to above.

The petitioner did not have the right of control over these men required by the Regulations to constitute them employees. The lower court in its opinion stated respecting the reservation of power of control:

> "Nothing could be more effective to this end than the simple expedient of requiring that (1) he finish the job assigned, (2) get the signature of a satisfied customer, (3) return dutifully to appellant's office, (4) present the signed card and get his money." (R. 71)

The facts found by the Court, however, contain the following:

> "The men in the yard are not required to take any job offered and may, and sometimes do, refuse particular jobs. * * * Sometimes after accepting a job a man will refuse to do the job of storing if upon examination the job appears unusually hard. * * * (R. 58-59)
>
> When a coal hustler refuses to store coal at the home of the customer, plaintiff usually sends another man. (R. 60).

The Court's reference numbered 1 appears contrary to said facts; numbers 2, 3 and 4 constitute merely the furnishing of evidence by the hustler that the coal has been stored to enable him to get his money, and is not evidence of right of control of the petitioner in the performance of the work by the men.

The Regulations provide:

> "However, the relationship between the individual who performs such services and the person for whom such services are rendered must, as to those services, be the legal relationship of employer and employee. * * *
> "Generally the relationship exists when the person for whom services are performed has the right to control

and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done." (App. 18)

The facts found by the trial court clearly show that these coal hustlers were not subject to the required control. The workers involved here not falling within the Regulations of the Commissioner, the position taken by the respondent is contrary to the Department's own Regulations.

The lower court in its opinion (R. 42) held coal hustlers to be employees under a liberal construction of the law. However, with what elasticity may a liberal construction be applied? Certainly, under a liberal construction of the law workers not falling within the obvious terms of the Statute and Regulations should not be held to be covered thereby, even under a liberal view of the same.

The lower court in its opinion cited the *Vogue* case in which reference was made to the decision of this Court holding newsboys to be employees within the meaning of the National Labor Relations Act. *National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111, 64 S. Ct. 851. However, that Act is more broad in its coverage than the Social Security Act, and should not be authority for the lower Court in this case.

Congress specifically exempted a large field of workers from the provisions of the Social Security Act including domestic labor, agricultural labor, casual labor not in the course of the employer's trade or business and other types of employment (Act Section 1426 b-h). These exemptions from the operation of the Act clearly show the purpose of Congress in not intending that all workers be embraced within the provisions of the Act. Those exempted clearly are employees. Therefore, it cannot be said that Congress, specifically excluding certain types of actual employees, intended that the Social Security Act cover the type of work-

ers involved here who are paid by the job for doing work where the petitioner had no right to compel them to take a particular job, and in which no control or the right of control over the performance of the work is retained by the supposed employer, and where the men often refuse to do specific jobs because not to their liking.

The practical effect of this decision on coal dealers will be that out of each storage payment of 75¢ or such sum as the hustlers will receive, the dealer will have to, under the law, deduct 1 per cent as the so-called employee's share. In many cases the hustlers collect direct from the consumer and in those cases it would be impossible for the dealer to receive the employee's share. These hustlers are mostly irresponsible persons and are not interested in having taxes taken out of their compensation. While the question of withholding tax is not involved in this case and the decision does not necessarily mean that these men are employees for all purposes, should they be deemed to be employees under that Act the dealer might also be required to withhold a certain percentage from each storage payment. This would result in difficulty in securing men to do work at the prevailing rate as the prime interest of these men is the amount they actually receive for the work. In situations of this sort where the men performing the work receive pay by the job at a small rate, a vast amount of bookkeeping and record keeping would necessarily be entailed and the difficulty of properly collecting and reporting the amount due the Government is readily seen.

CONCLUSION.

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

RAYMOND J. GRACE, trading under the name and style of R. J. & M. C. Grace.

By LOWRY N. COE,
Attorney for Petitioner.

APPENDIX OF STATUTES AND REGULATIONS INVOLVED.

INTERNAL REVENUE CODE—CHAPTER 9

SUBCHAPTER A—EMPLOYMENT BY OTHERS THAN CARRIERS

(Federal Insurance Contributions Act)

Part I—Tax on Employees

26 U. S. C. A.

SEC. 1400 RATE OF TAX.

In addition to other taxes, there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of the wages (as defined in section 1426 (a)) received by him after December 31, 1936, with respect to employment (as defined in section 1426 (b)) after such date:

(1) With respect to wages received during the calendar years 1939, 1940, 1941, 1942, 1943, and 1944, the rate shall be 1 per centum.

(2) With respect to wages received during the calendar year 1945, the rate shall be 2 per centum. * * *

SEC. 1401. DEDUCTION OF TAX FROM WAGES.

(a) REQUIREMENT.—The tax imposed by section 1400 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid.

Part II—Tax on Employers

SEC. 1410. RATE OF TAX.

In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 1426 (a)) paid by him after December 31, 1936, with respect to employment (as defined in section 1426 (b)) after such date:

(1) With respect to wages paid during the calendar years 1939, 1940, 1941, 1942, 1943, and 1944, the rate shall be 1 per centum. * * *

SEC. 1426. DEFINITIONS.

When used in this subchapter—

(Sec. 1426 (a))

(a) WAGES.—The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include—(exceptions not applicable) * * *

(Sec. 1426 (b))

(b) EMPLOYMENT.—The term "employment" means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, by an employee for the person employing him, irrespective of the citizenship or residence of either, (A) within the United States, or (B) on or in connection with an American vessel under a contract of service which is entered into within the United States or during the performance of which the vessel touches at a port in the United States, if the employee is employed on and in connection with such vessel when outside the United States, except * * *

SEC. 1429. RULES AND REGULATIONS.

The Secretary shall make and publish such rules and regulations, not inconsistent with this subchapter, as may be necessary to the efficient administration of the functions with which he is charged under this subchapter. The Commissioner, with the approval of the Secretary, shall make and publish rules and regulations for the enforcement of this subchapter.

SUBCHAPTER C—TAX ON EMPLOYERS OF EIGHT OR MORE

("Federal Unemployment Tax Act")

26 U. S. C. A.

SEC. 1600. RATE OF TAX.

Every employer (as defined in section 1607 (a)) shall pay for the calendar year 1939 and for each calendar year

thereafter an excise tax, with respect to having individuals in his employ, equal to 3 per centum of the total wages (as defined in section 1607 (b)) paid by him during the calendar year with respect to employment (as defined in section 1607 (c)) after December 31, 1938.

SEC. 1607. DEFINITIONS.

When used in this subchapter—

(Sec. 1607 (a))

(a) EMPLOYER.—The term "employer" does not include any person unless on each of some twenty days during the taxable year, each day being in a different calendar week, the total number of individuals who were employed by him in employment for some portion of the day (whether or not at the same moment of time) was eight or more.

(Sec. 1607 (b))

(b) WAGES.—The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include—(exceptions not applicable) • • •

(Sec. 1607 (c))

(c) EMPLOYMENT.—The term "employment" means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, within the United States by an employee for the person employing him, irrespective of the citizenship or residence of either, except—(exceptions not applicable) • • •

SEC. 1609. RULES AND REGULATIONS.

The Secretary and the Social Security Board, respectively, shall make and publish such rules and regulations, not inconsistent with this subchapter, as may be necessary to the efficient administration of the functions with which each is charged under this subchapter. The Commissioner, with the approval of the Secretary, shall make and publish

rules and regulations for the enforcement of this subchapter, except sections 1602 and 1603.

REGULATIONS.

REGULATIONS 90 BUREAU OF INTERNAL REVENUE RELATING TO EXCISE TAX ON EMPLOYER UNDER TITLE IX OF THE SOCIAL SECURITY ACT, ARTICLE 205, C. F. R. TITLE 26, SEC. 403 ET SEQ.:

"EMPLOYED INDIVIDUALS.—An individual is in the employ of another within the meaning of the Act if he performs services in an employment as defined in section 907(c). However, the relationship between the individual who performs such services and the person for whom such services are rendered must, as to those services, be the legal relationship of employer and employee. The Act makes no distinction between classes or grades of employees. Thus, superintendents, managers, and other superior employees are employees within the meaning of the act.

The words 'employ', 'employer', and 'employee', as used in this article, are to be taken in their ordinary meaning. * * *

Generally the relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor, not an employee. * * *

The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.

Individuals performing services as independent contractors are not employees. Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession in which they offer their services to the public, are independent contractors and not employees. * * *"

REGULATIONS 91 OF THE BUREAU OF INTERNAL REVENUE RELATING TO EMPLOYEES TAX AND EMPLOYERS TAX UNDER TITLE VIII OF THE SOCIAL SECURITY ACT, ARTICLES 2, 3, AND 4; C. F. R. TITLE 26, SEC. 402 ET SEQ.

"ART. 2. EMPLOYMENT.—* * * To constitute an employment the legal relationship of employer and employee must exist between the person for whom the services are performed and the individual who performs them, and the services involved must be performed within the United States, that is, within any of the several States, the District of Columbia, or the Territory of Alaska or Hawaii. (See articles 3 and 4 as to who are employees and employers, respectively, and articles 5 to 13, inclusive, relating to excepted services.) * * *

ART. 3. WHO ARE EMPLOYEES.—Every individual is an employee within the meaning of Title VIII of the Act if he performs services in an employment as defined in section 811 (b) (see article 2).

However, the relationship between the person for whom such services are performed and the individual who performs such services must as to those services be the legal relationship of employer and employee. Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection it is not necessary that the employer actually direct or control the manner in which the services

are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee.

Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

* * * * * * * * * *

The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists."

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CITATIONS

652586—45

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 102

RAYMOND J. GRACE, TRADING UNDER THE NAME AND STYLE OF R. J. & M. C. GRACE, PETITIONER

v.

M. HAMPTON MAGRUDER, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the district court (R. 42–46) and of the court of appeals (R. 68–71) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered March 19, 1945 (R. 72). The petition for a writ of certiorari was filed on June 1, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether individuals known as "coal hustlers" are petitioner's employees within the meaning of Sections 811 (b) and 907 (c) of the Social Security Act and Sections 1426 (b) and 1607 (c) of the Internal Revenue Code.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*.

STATEMENT

The facts as found by the district court (R. 56–60) are summarized as follows:

Petitioner is engaged in the retail coal business in the District of Columbia (R. 56).

The individuals described as "coal hustlers" are itinerant laborers who store coal sold by petitioner and delivered in one of his trucks to the homes or places of business of his customers. The coal hustlers usually congregate daily at petitioner's coal yard for the purpose of obtaining jobs of storing coal. They have no regular hours, are not required to report daily or at any stated time, and may go and come as they please. Many of them have followed this practice off and on for from four to twenty years. No quarters are furnished them, although petitioner permits them to build a fire in the coal yard in cold and inclement weather. When an order for coal is received and the customer wants

the coal stored, petitioner or one of his employees calls on the men congregated in the yard to take the job of storing the coal ordered. The men are not required to take any job offered and sometimes refuse particular jobs. When a job is accepted by one of the men, he is given a card showing the name and address of the customer and the number of tons of coal to be stored. He is usually taken to the place of the job by the truck carrying the coal, although he sometimes goes there by streetcar or by other means. After the coal is dumped in the alley or street, the coal hustler proceeds to store the coal. After the coal is stored, the coal hustler obtains the signature of the customer on the card which was furnished him by petitioner and then returns to petitioner's place of business where he is paid at the rate of 50 cents or 75 cents per ton. The amount so paid is usually added to and separately stated on petitioner's bill to the customer for the coal purchased and delivered. Where coal is sold by petitioner for cash on delivery, the cost of storing is usually added to the bill and after the coal is dumped the truck driver presents the bill to the customer, and collects the entire amount. The hustler is paid for the coal so stored upon his return to petitioner's office with a card signed by the customer. In some instances, in cash on delivery sales, the truck driver, after being paid for the coal and storage charges, returns the

amount charged for storing to the customer, who pays the hustler after the coal has been stored. (R. 58–60.)

Petitioner has no agreement or contract of any type with any of these men, reserving the right to supervise the work of storing or directing the manner in which they store the coal. The men furnish their own buckets and shovels. Petitioner has kept no record of the names and addresses of any of the men. They are not on his payroll. Petitioner makes no profit on the storage charges and carries no workmen's compensation or liability insurance on the hustlers. (R. 60.)

After paying the taxes involved for the taxable years 1936 to 1941, inclusive, the petitioner filed claims for refund which were disallowed by the Commissioner of Internal Revenue (R. 57–58). Petitioner instituted an action for recovery of the taxes in the district court (R.1–10), which entered judgment for the respondent (R. 63). The judgment of the district court was affirmed on appeal by the Court of Appeals for the District of Columbia (R. 72).

ARGUMENT

1. This case depends on its own facts, and was correctly decided by the court below. The principles properly applicable in a situation of the type here involved have been well stated by the Circuit Court of Appeals for the Fourth Circuit

in *United States* v. *Vogue, Inc.*, 145 F. 2d 609. In that case, in language quoted with approval by the court below in the instant case, it was pointed out that in determining the scope of the Social Security Act common law rules as to distinctions between servants and independent contractors throw but little light on the question involved. The applicability of such an act, enacted pursuant to a public policy unknown to the common law, is to be judged rather from the purposes that Congress had in mind than from common law rules worked out for determining tort liability. *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111. See also *Walling* v. *American Needlecrafts, Inc.*, 139 F. 2d 60 (C. C. A. 6).

Moreover, the court below correctly held that the record established petitioner's right to control and supervise coal hustlers not only as to the final result, but in the performance of the task itself, and that even under the common law concept of the employer-employee relationship this right, rather than the actual exercise of control or supervision, is the significant factor. *Singer Manufacturing Co.* v. *Rahn*, 132 U. S. 518, 523.

2. While the decision below may in part be justified on the basis of the common law concept of the employer-employee relationship, we nevertheless are in substantial agreement with petitioner that the decision below, as well as the decision in the *Vogue* case, represents a funda-

mental conflict with the view followed by the Circuit Court of Appeals for the Sixth Circuit in *Glenn* v. *Beard,* 141 F. 2d 376, certiorari denied, 323 U. S. 724, rehearing denied, April 2, 1945. In our petition for rehearing in the latter case we adverted to the conflict between that decision and the decision in the *Vogue* case in the Fourth Circuit, and we emphasized the importance of the question to the efficient administration of the Social Security Act and the revenue laws. In a supplemental memorandum filed in connection with our petition for rehearing we called the attention of the Court to the decision just then rendered below in the instant case, and pointed out that the conflict had by that decision been extended to include the District of Columbia. This Court, however, denied rehearing. In these circumstances, and believing the decision below to be correct, we submit that the petition herein should likewise be denied.

Respectfully submitted.

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JUNE 1945.

APPENDIX

Social Security Act, c. 531, 49 Stat. 620:

TITLE VIII—TAXES WITH RESPECT TO EMPLOYMENT

* * * * *

SECTION 801. In addition to other taxes, there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of the wages (as defined in section 811) received by him after December 31, 1936, with respect to employment as defined in section 811) after such date: * * * (42 U. S. C. 1940 ed., Sec. 1001.)

SEC. 802 (a). The tax imposed by section 801 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid. Every employer required so to deduct the tax is hereby made liable for the payment of such tax, and is hereby indemnified against the claims and demands of any person for the amount of any such payment made by such employer.

* * * * *

(42 U. S. C. 1940 ed., Sec. 1002.)

SEC. 804. In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 811) paid by him after December 31, 1936, with

respect to employment (as defined in section 811) after such date: * * *
(42 U. S. C. 1940 ed., Sec. 1004.)

SEC. 811. When used in this title—

(a) The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; * * *

(b) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, [with exceptions not herein relevant] * * *
(42 U. S. C. 1940 ed., Sec. 1011.)

TITLE IX—TAX ON EMPLOYERS OF EIGHT OR MORE

* * * * *

SECTION 901. On and after January 1, 1936, every employer (as defined in section 907) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in section 907) payable by him (regardless of the time of payment) with respect to employment (as defined in section 907) during such calendar year: * * *
(42 U. S. C. 1940 ed., Sec. 1101.)

SEC. 907. When used in this title—

* * * * *

(b) The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash.

(c) The term "employment" means any service, of whatever nature, performed within the United States by an employee

for his employer, [with exceptions not herein relevant] * * *
(42 U. S. C. 1940 ed., Sec. 1107.)

Sections 1400, 1401 (a) (b), 1410, 1426 (a) (b), 1600 and 1607 (b) (c) of the Internal Revenue Code, insofar as pertinent here, are substantially the same as Sections 801, 802 (a), 804, 811 (a) (b), 901, and 907 (b) (c) set out above.

Treasury Regulations 90, promulgated under Title IX of the Social Security Act:

> ART. 205. *Employed individuals.*—An individual is in the employ of another within the meaning of the Act if he performs services in an employment as defined in section 907 (c). However, the relationship between the individual who performs such services and the person for whom such services are rendered must, as to those services, be the legal relationship of employer and employee. The Act makes no distinction between classes or grades of employees. Thus, superintendents, managers, and other superior employees are employees within the meaning of the Act.
>
> The words "employ," "employer," and "employee," as used in this article, are to be taken in their ordinary meaning. An employer, however, may be an individual, a corporation, a partnership, a trust or estate, a joint-stock company, an association, or a syndicate, group, pool, joint venture, or other unincorporated organization, group, or entity. An employer may be a person acting in a fiduciary capacity or on behalf of another, such as a guardian, committee, trustee, executor or administrator, trustee in bankruptcy, receiver, assignee for the benefit of creditors, or conservator.

Whether the relationship of employer and employee exists, will in doubtful cases be determined upon an examination of the particular facts of each case.

Generally the relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor, not an employee.

If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if two individuals in fact stand in the relation of employer and employee to each other, it is of no consequence that the employee is

designated as a partner, coadventurer, agent, or independent contractor.

The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.

Individuals performing services as independent contractors are not employees. Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

Article 3, Treasury Regulations 91, promulgated under Title VIII of the Social Security Act, Section 402.204 of Treasury Regulations 106, promulgated under the Federal Insurance Contributions Act, Section 403.204 of Treasury Regulations 107, promulgated under the Federal Unemployment Tax Act, insofar as pertinent here, are substantially the same as Article 205 of Treasury Regulations 90 set out above.

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